UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

ROBERT ALVARADO in his capacity as Trustee of the CARPENTERS HEALTH AND WELFARE TRUST FUND FOR CALIFORNIA, et al.,

Plaintiffs,

v.

MARGARET ELLEN ALVAREZ, Individually; MARGARET ELLEN ALVAREZ, Individually and dba R.J. HATLER CONSTRUCTION, INC.; R.J. HATLER CONSTRUCTION, INC., a California Corporation

Defendants.
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No. C-05-00569 PJH (WDB)

REPORT AND RECOMMENDATION RE PLAINTIFFS' MOTION FOR DEFAULT JUDGMENT

Plaintiffs are a voluntary unincorporated association to which various local carpenter unions belong ("the Union"), various fringe benefit trust funds established for the benefit of Union members, and the board of trustees of those fringe benefit trust funds. *See*, Petition To Confirm Arbitration Award and Complaint For Breach of Contract on Promissory Note, Breach of Contract, Actual Damages, Breach of Fiduciary Duty, and Audit, filed February 8, 2005, ("Petition"), at 2. Defendant, R.J. Hatler Construction, Inc., is bound by a collective bargaining agreement ("CBA") and various trust agreements to make

timely contributions to plaintiff trust funds for work performed by R.J. Hatler Construction employees. Declaration of Richard Alcantar in Support of Motion for Default Judgment, filed May 16, 2005, ("Alcantar Decl."), at ¶¶3, 4 and 5; Errata to Declaration of Richard Alcantar in Support of Motion for Default Judgment, at Ex. B ("Errata"); and Second Errata to Declaration of Richard Alcantar in Support of Motion for Default Judgment, at Ex. A ("Second Errata"); *see also,* Petition at 3. Defendant, Margaret Ellen Alvarez ("Alvarez") signed a Promissory Note on November 10, 2003, in which she acknowledges "doing business as R.J. Hatler Construction" and being "individually liable, bound, and subject to [the CBA and various trust agreements]." *See*, Petition at 3 and Ex. C.

At some point, a dispute arose between the parties over the unpaid promissory note and unpaid benefit contributions. Pursuant to the terms of the CBA, plaintiffs initiated a grievance procedure, ultimately submitting the grievance to a Board of Adjustment. Petition at 5.

The Board of Adjustment conducted a hearing on the grievance on March 9, 2004. *See*, Petition at Ex. D (Decision and Award of the Board of Adjustment). Ms. Alvarez appeared, pro se, before the Board of Adjustment on her own behalf and in her representative capacity for R.J. Hatler. *Id*. On March 10, 2004, the Board of Adjustment issued a Decision and Award ("Award") in favor of plaintiffs, in the amount $347,914.91.[1]

On February 8, 2005, plaintiffs filed this action alleging that defendants have refused to comply with the Board of Adjustment's Award, failed to meet their obligations under the Promissory Note, and failed to allow plaintiffs to conduct an audit as required by the various Trust Agreements and the Award. Petition at 5, 6 and 8.

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[1]The Decision and Award lists the amounts due for unpaid fringe benefit contributions and liquidated damages as $347,614.91 and for the cost of the Board of Adjustment proceedings as $300.00. Petition at Ex. D.

Plaintiffs served defendants with a copy of the Petition and related documents. *See*, Summons and Proofs of Service, filed April 5, 2005, and Supplemental Declaration of Concepción E. Lozano-Batista in Support of Response to Order for Supplemental Briefing, filed July 26, 2005, ("Supp. Lozano Decl.") at Ex. A. Defendants have not responded to plaintiffs' Petition. In response to plaintiffs' application for entry of default, the Clerk of the Court entered default as to defendants on April 22, 2005.

On May 16, 2005, plaintiffs filed and served their Motion for Default Judgment By Court ("Motion"). On June 22, 2005, Judge Hamilton referred this matter to a Magistrate Judge for report and recommendation. On July 13, 2005, the Court ordered plaintiffs to submit supplemental briefing, fixed a deadline for defendants to respond, and scheduled a hearing. The Court also ordered plaintiffs to serve a copy of that order on defendants immediately. Plaintiffs' counsel represented that defendants were served with that order. *See*, Transcript of August 10, 2005, hearing. Plaintiffs filed supplemental materials on July 26, 2005. Defendants have not responded. On August 10, 2005, the Court conducted a hearing in connection with plaintiffs' Motion. No appearance was made on behalf of defendants.

Following the hearing, the Court's staff contacted plaintiffs' counsel to notify plaintiffs that, in the Court's view, defendants had not been properly served with the Petition. See, discussion section I, *infra*. On August 30, 2005, plaintiffs filed a letter asking the Court to reconsider that conclusion.

In their motion for default judgment, plaintiffs seek the following relief: (1) confirmation of the March 10, 2004, Board of Adjustment Award[2]; (2) an order

[2]Plaintiffs' Motion seeks, *inter alia*, confirmation of the Award for "$347,914.91 in unpaid fringe benefits, liquidated damages, interest, amounts due and owing on the Promissory Note; and costs of arbitration proceedings for the period of May 2003 through January 2004." Motion at 3. Plaintiffs' Motion indicates that the Board's Award includes the amount owed on the promissory note. Although the Board's Award appears to include the amount owed under

directing defendants to submit to an audit as required by the CBA and trust agreements; (3) an order requiring defendants to pay all sums revealed by the anticipated audit as due and owing; (4) reasonable attorneys' fees and costs related to this lawsuit; and (5) an injunction permanently enjoining defendants to timely submit all required monthly contribution reports and to timely pay all contributions owing.[3]

The Court RECOMMENDS as follows.

I. Confirmation of the March 10, 2004, Board of Adjustment Award

A. Applicable Law

Plaintiffs seek confirmation of the March 10, 2004, Board of Adjustment Decision and Award pursuant to section 301 of the Labor Management Relations Act. *See*, Memorandum of Points and Authorities in Support of Petition to Confirm Arbitration Award, filed February 8, 2005, and Response to Order for Supplemental Briefing re Motion for Default Judgment, filed July 26, 2005, ("Supplemental Response") at 3-4.

This Court believes, but is not certain, that the Federal Arbitration Act applies to collective bargaining agreements such as the one in this case. *See, Circuit City v. Adams*, 532 U.S. 105 (2001) (holding that the only contracts

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the promissory note, it does not explicitly mention the promissory note. Plaintiffs represent that the promissory note was included as part of plaintiffs' Exhibit A to the Board and, therefore, was before the Board. *See*, Response to Order for Supplemental Briefing re Motion for Default Judgment, filed July 26, 2005, ("Supplemental Response") at 5.

[3]Plaintiffs' Motion also seeks "an accounting between Plaintiffs and Defendant." Motion at 3. Plaintiffs later clarify that their request for an audit and an accounting is "one and the same." Supplemental Response, at 11.

exempted from the FAA's coverage are contracts of "employment of transportation workers").[4]

This Court is aware of authority in the Ninth Circuit that appears to suggest that, in this circuit, the FAA does not cover CBAs. *See, PowerAgent, Inc. v. Elec. Data Sys. Corp.,* 358 F.3d 1187, 1193 (9th Cir., 2004). However, at this juncture, the Ninth Circuit has not squarely decided whether the Supreme Court 's decision in *Circuit City* overrules the Circuit's earlier view that the FAA does not apply in these kinds of situations. *See, PowerAgent Inc.,* 358 F.3d at 1193 n.1. Given the breadth of *Circuit City*'s language, this Court is compelled to conclude that CBAs are not exempt from the FAA.

Under the pertinent provision of the Federal Arbitration Act,

> (i) If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then (ii) at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award, **and thereupon the court must grant such an order** (iii) unless the award is vacated, modified, or corrected, as prescribed in sections 10 and 11 of [the FAA] . . .(iv) Notice of the application shall be served upon the adverse party, and thereupon the court shall have jurisdiction of such party as though he had appeared generally in the proceeding. If the adverse party is a resident of the district within which the award was made, such service shall be made upon the adverse party or his attorney as prescribed by law for service of notice of motion in an action in the same court. If the adverse party shall be a nonresident, then the notice of the application shall be served by the marshal of any district within which the adverse party may be found in like manner as other process of the court.

9 U.S.C. §9 (emphasis and roman numerals added).

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[4]*See also, Smart v. International Brotherhood of Electrical Workers*, 315 F.3d 721, 724 (7th Cir. 2003) (citing *Circuit City* for the proposition that the FAA covers collective bargaining agreements).

As alluded to above, the Court's staff notified plaintiffs' counsel that, because defendants are nonresidents of this district and because this Court concludes that the FAA applies to plaintiffs' Petition, plaintiffs were required to serve defendants via the marshal.[5] Plaintiffs have not.[6]

Plaintiffs' August 30th letter asks the Court to reconsider its conclusion that the FAA applies to arbitration agreements contained in collective bargaining agreements. According to plaintiffs, section 301 of the LMRA governs their effort to confirm the arbitration Award, and plaintiffs contend that they have satisfied the service requirements applicable to that statute.

We grant plaintiffs' request that we reconsider our ruling with respect to the applicability of the FAA. As indicated, we continue to conclude that *Circuit City* compels us to rule that the FAA applies to arbitration agreements contained in collective bargaining agreements. However, we also conclude that the applicability of the FAA does not preclude confirmation of an arbitration award

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[5]At the August 10, 2005, hearing the Court erroneously indicated that it appeared that plaintiffs would satisfy all requirements set forth in section nine of the FAA. Following the hearing, while drafting this Report and Recommendation, the Court observed that plaintiffs had not, in fact, satisfied the service requirement.

[6]Plaintiffs satisfy all other requirements imposed by section nine of the FAA for confirmation of the March 10, 2004, Board of Adjustment Decision and Award.

First, the CBA specifies that a party may obtain a judgment from this Court confirming an award by the Board.

> A decision of the Board of Adjustment by majority vote, or the decision of a permanent Arbitrator shall be enforceable by a petition to confirm an arbitration award filed in . . . the United States District Court for the Northern District of California.

Errata, at Ex. A (Carpenters Master Agreement) at §51, ¶13 and Supplemental Declaration of Richard Alcantar in Support of Response to Order for Supplemental Briefing, filed July 26, 2005, ("Supp. Alcantar Decl.") at ¶2.

Second, plaintiffs' request is timely. The Board issued its Award on March 10, 2004. Plaintiffs applied for an order confirming the Award less than one year later on February 8, 2005.

Third, nothing in the record suggests that the Board of Adjustment Award has been vacated, modified, or corrected pursuant to sections 10 or 11 of the FAA. We therefore RECOMMEND that the District Court FIND that the Award has not been so vacated, modified, or corrected.

under the alternate avenue of the LMRA. Therefore, until the Ninth Circuit tells us otherwise, we RECOMMEND that the District Court find that where plaintiffs seek to confirm an award made pursuant to a collective bargaining agreement plaintiffs may seek confirmation of that award if they satisfy the standards for doing so under either the LMRA or the FAA.

In so recommending, we acknowledge *Textile Workers Union of America v. Lincoln Mills of Ala.*, 353 U.S. 448 (1957) and its companion case *Goodall-Sanford v. United Textile Workers of America*, 353 U.S. 550 (1957), as well as the Seventh Circuit's ruling in *Smart v. International Brotherhood of Electrical Workers*, 315 F.3d 721 (2003). *Lincoln Mills*, in which a union sought to compel arbitration pursuant to a collective bargaining agreement and which was decided after enactment of the FAA, established the LMRA as the basis for courts to create a federal common law with respect to enforcement of collective bargaining agreements. 353 U.S. at 456-7. At that same time, in *Goodall-Sanford*, the Court was asked whether an order compelling arbitration in the labor context is appealable. Answering, the Court stated directly, "[t]he right enforced here is one arising under s301 of the Labor Management Relations Act of 1947." These cases post-date the FAA and seem to reflect the view that the LMRA is a primary vehicle for enforcing arbitration provisions in collective bargaining agreements.

Referring to *Lincoln Mills*, the Seventh Circuit ruled that if there were a conflict between the FAA and LMRA that circuit

> would resolve it in favor of section 301. . . . Where there is no conflict, however, and the FAA provides a procedure or remedy not found in section 301 but does not step on section 301's toes, then, . . . We apply the [FAA].

Smart , 315 F.3d at6 724-5.

Furthermore, permitting confirmation of an arbitration award under an alternate statutory scheme is consistent with and serves the pro-arbitration policy underlying the FAA. We note that federal courts will permit enforcement of state statutes that affect arbitration clauses as long as the statutes are "generally

applicable" rather than specifically hostile to arbitration. *Bradley v. Harris Research, Inc.*, 275 F.3d 884 (9th Cir. 2001); *see also, Circuit City*, 532 U.S. at 112 and 122 ("the Act was . . . pre-emptive of state laws hostile to arbitration" and "Congress intended the FAA to . . . pre-empt state antiarbitration laws to the contrary") (emphasis added). It would make little sense to permit use of generally applicable state laws that do not directly undermine the FAA's goals and policies but not to permit use of a comprehensive federal statutory scheme that is not hostile to the goals or policies of the FAA.

For the above reasons, we RECOMMEND that the District Court hold that confirmation of the arbitration Award may be sought under either the FAA or the LMRA.

B. Satisfaction of Standard under LMRA

Service of an action based on the LMRA is made pursuant to Federal Rule of Civil Procedure 4. Rule 4 permits personal service by an eligible process server within 120 days of the filing of the complaint. F.R.C.P. 4(c), (e), (h) and (m). Plaintiffs caused defendants to be personally served by a valid process server within 120 days of filing the Petition.[7] See, Summons and Proofs of Service, filed April 5, 2005. Accordingly, we turn to the substance of plaintiffs' request.

The Ninth Circuit has articulated the standard for review under the LMRA as follows:

> Judicial review of an arbitrator's decision in a labor dispute is extremely limited. . . .As long as the arbitrator is even arguably construing or applying the contract and acting within the scope of this authority, that a court is convinced he committed serious error does not suffice to overturn his decision. . . . [A]mbiguity in an opinion

[7]We note that, in this case, the distinctions between the service requirements of the FAA and those of the LMRA are of little practical import. The most important thing in cases such as this is that the person who could be adversely affected actually knows about the proceedings before the court and about her opportunity to appear. In this case, its very clear that Ms. Alvarez, an individually named defendant and the representative for the company, was actually notified of these proceedings through personal service. See, Summons and Proofs of Service, filed April 5, 2005.

> that accompanies an award, or a lack of any real opinion at all, is not sufficient to permit an inference that the arbitrator exceeded his authority.

Garvey v. Roberts, 203 F.3d 580, 588 (9th Cir. 2000) (internal citations and quotations omitted).

The Court must uphold the arbitrator's award unless "(1) [it is clear from the arbitral opinion that] the award does not draw its essence from the [CBA] and the arbitrator is dispensing his own brand of industrial justice; (2) . . . the arbitrator exceeds the boundaries of the issues submitted to him; (3) . . . the award is contrary to public policy; or (4) . . . the award is procured by fraud." *Southern California Gas Co., v. Utility Workers Union of America*, 265 F.3d 787 (9th Cir. 2001); *Garvey,* 203 F.3d 580, 585-89.

We have carefully reviewed the March 10, 2004, Board of Adjustment Award. As the Award construes the effective Carpenters Master Agreement (*See*, Errata, at Ex. B. and Supplemental Response at 12), and appears to be within the Board's authority in all other respects, we FIND that the Award would appropriately be confirmed under the LMRA. *See*, Transcript of August 10, 2005, hearing.

We therefore RECOMMEND that the District Judge confirm the Board of Adjustment's Award under the standards of review established by the LMRA.

Under the Board of Adjustment's Award, plaintiffs are entitled to the following relief[8]:

1. A court order directing defendants to immediately cease and desist further violations of the current Carpenters Master Agreement for the remainder of its term, and directing defendants to comply with the agreement for the remainder of its term.

[8]Although we list here only the most significant aspects of the March 10, 2004, Board of Adjustment award, we RECOMMEND that the Award be confirmed in its entirety.

2. A court order directing defendants to pay a sum total of $347,614.91 which encompasses: (1) the Promissory Note for $120,672.06, representing delinquent contributions for the period May 2003 through August 2003, as well as for liquidated damages ($13,378.02) and accrued interest at the rate of 6% ($3,958.70) on the delinquent contributions for that period; and (2) $190,551.94, representing delinquent contributions for the period September 2003 through January 2004, and liquidated damages ($19,055.19) on the delinquent contributions for that period.

3. A court order directing defendants to immediately cease and desist from improperly reporting and untimely paying Trust Fund contributions that are required to be paid to the various Trust Funds referred to in the Carpenters Master Agreement.

4. A court order directing defendants to correctly report and timely pay all required contributions to each and all of the various Trust Funds referred to in the Carpenters Master Agreement. Timely payment means that all payments must be paid "on or before the 15th and no later than the 25th of each month following the work month for which each such report is made."

5. A court order directing defendants to pay $300.00 representing defendants' share of the cost of the arbitration proceedings.

See, Petition at Ex. D (Award).

II. Order Requiring Defendants to Submit to Audit and Pay All Sums Revealed By Audit as Due and Owing

The governing CBA requires,

> [e]ach individual employer upon request of the Union, the Employer, or any Trust Fund specified in this Agreement, shall permit the Trust Fund Auditors to review any and all records relevant to the

> enforcement of the provisions of this Agreement and to enter upon the premises of such individual employer during business hours at reasonable time or times to examine and copy such books, records, papers or reports . . . as may be necessary to determine whether or not the individual employer is making full payment of all sums required by this Agreement.

Errata, at Ex. A (Carpenters Master Agreement) at §21 and ("Supp. Alcantar Decl.") at ¶2. Accordingly, we RECOMMEND that the District Court find that plaintiffs are entitled to an audit of defendants' relevant records.

In addition, plaintiffs seek a court order requiring defendants to pay all sums revealed as due and owing by the anticipated audit.

Plaintiffs' counsel represented that the audit procedures followed by plaintiffs include

> a formal audit request by the Trust Fund to defendants for an audit to take place on the defendants' premises at a reasonable time with defendants paying the cost of the audit. If the audit reveals that additional contribution amounts are due and owing to plaintiffs, plaintiffs will request that the Court amend the Judgment to include such amounts. If such request is necessary, plaintiffs will petition the court in writing and will provide defendants with sufficient notice so that they may appear if desired.

Supplemental Response at 7.

The Court FINDS that plaintiffs' stated practice provides defendants with a sufficient opportunity to challenge the accuracy of the audit. Accordingly, we RECOMMEND that the District Judge grant plaintiffs' request for an order directing defendants to pay all sums revealed as due and owing by the audit on the condition that defendants are given sufficient notice of the pendency of any court proceedings and a fair opportunity to challenge the accuracy of the audit before the District Judge.

Plaintiffs also seek post-judgment interest on unpaid contributions which are found as a result of the audit, if any. Response to Order for Supplemental Briefing re Motion for Default Judgment, filed July 26, 2005, at 7:14-16. Plaintiffs contend that they are entitled to post-judgment interest at a rate of 10%

pursuant to Cal. Civ. Proc. §658.010. *Id.* At this juncture, no judgment has been entered and no determination has been made that additional monies (principal) are owing. Therefore, the Court makes no finding concerning whether interest on an amount found at an audit, if any, is chargeable at all, the appropriate interest rate, or whether post-judgment interest will run from the date of the original judgment or from the date the judgement is amended. We RECOMMEND the District Judge refrain from ruling on these matters until the issues become ripe.

III. Attorneys' Fees and Costs

Plaintiffs based their initial request for attorneys' fees and costs on their assertion that "defendant's refusal to comply with the arbitration award is unjustified and in bad faith." *See*, Memorandum of Points and Authorities in Support of Petition to Confirm Arbitration Award at 4. Plaintiffs have also indicated that their request for fees and costs may be based on the terms of the CBA, the terms of the Promissory Note signed by Ms. Alvarez, and the March 10, 2004, Board of Adjustment's Award. Supplemental Response at 7. Finally, plaintiffs may also be entitled to attorneys' fees and costs under Section 1132(g) of ERISA, which requires a court to award plaintiffs "reasonable attorney's fees and costs of the action" when Trustees obtain a judgment in their favor recovering delinquent contributions to fringe benefit trust funds. 29 U.S.C. §1132(g)(2)(D); *Northwest Administrators Inc., v. Albertson's Inc.*, 104 F.3d 253, 258 (9th Cir. 1996).

We found that the Board of Adjustment did not exceed its authority in issuing the Award. *See*, section, I, *supra*. If the District Judge adopts our recommendation to confirm the Board of Adjustment's Award, the Award entitles plaintiffs to reasonable fees and costs incurred to enforce the Award. Accordingly, we need not consider alternative bases for the fee award.

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A. Attorneys' Fees

Plaintiffs seek reimbursement of attorneys' fees in the amount $5,400.00. *See*, Supp. Lozano Decl. at ¶2; Declaration of Concepción E. Lozano-Batista in Support of Motion for Attorneys Fees and Costs, filed August 10, 2005, ("Fee Decl.") at ¶2. Plaintiffs incurred fees in connection with review of the file, preparing documents (*e.g.*, Petition), requesting default, and filing the motion for default judgment and supporting documentation. Supp. Lozano Decl., at ¶2. Counsel expended twenty seven (27) hours in connection with this lawsuit. Based on this Court's experience with similar cases and counsel's billing entries, we FIND that the number of hours expended by plaintiffs' counsel in connection with the instant case is reasonable.

Plaintiffs' counsel billed at the rate of $200.00 per hour for work by Barry Hinkle and Concepción E. Lozano-Batista. Declaration of Concepción E. Lozano-Batista in Support of Motion for Default Judgment, filed May 16, 2005, ("Lozano Decl.") at ¶2. Mr. Hinkle is a managing shareholder at Weinberg, Roger & Rosenfeld and was admitted to the California Bar in 1976. He has been with the firm for 22 years. Ms. Lozano-Batista is an associate attorney at Weinberg, Roger, & Rosenfeld and was admitted to the California Bar in 2003. She has been with the firm for one year. Supp. Lozano Decl., at ¶3. At the hearing on plaintiffs' Motion, plaintiffs' counsel represented that Weinberg, Roger & Rosenfeld has agreed to bill its union clients at the rate of $200.00 per hour for both attorneys despite the fact that Mr. Hinkle is substantially more experienced and could seek a higher rate. Ms. Lozano-Batista also confirmed that the firm's union and trust fund clients are actually billed at this rate and pay it. Having sat in this jurisdiction for 21 years, and having learned a great deal over that period about billing rates in this region for a wide range of legal work, the undersigned is well-positioned to pass judgment on the reasonableness of the hourly rates for which counsel seek compensation here. Accordingly, we FIND, and we RECOMMEND

that the District Judge find, that counsel's billing rate is commensurate with the prevailing market rate in the Bay Area for lawyers of plaintiffs' counsels' skill and experience doing the kind of work this matter involved.

Plaintiffs also seek reimbursement for fees incurred for work by their counsel's "paralegal department" which includes a "senior paralegal," a "paralegal," and a "Litigation Case Clerk." Supp. Lozano Decl., at ¶¶4-8. Courts routinely reimburse litigants for work conducted by a paralegal. Based on the Court's experience with similar cases and familiarity with billing rates in this jurisdiction, we FIND both the amount of time spent by the paralegals as well as their billing rates reasonable. However, plaintiffs have cited no legal authority for their claim that they are entitled to reimbursement for work conducted by a "litigation case clerk." The cost of utilizing staff such as Ms. Natwick, the "litigation case clerk," is in the nature of "overhead" and is typically subsumed within the billing rates charged for the firm's attorneys. Therefore, the Court FINDS that plaintiffs have not proved that they are entitled to $131.25 charged for Ms. Natwick's time. Accordingly, we RECOMMEND that Judge Hamilton deny plaintiffs' request for reimbursement of 'fees' incurred for work conducted by the "litigation case clerk."

B. Costs

Plaintiffs request costs in the amount of $715.68. Supp. Lozano Decl., at ¶11. This request encompasses costs for the Court's filing fee, courier and various other service costs, and costs incurred conducting electronic research. Supp. Lozano Decl., at ¶10.[9] We are satisfied both that plaintiffs incurred all of the costs listed above, and that the costs are reasonable.

[9]Plaintiffs' counsel stated, "our client will be billed for courier service for filing Plaintiff's Motion for Default Judgment and related papers." Lozano Decl., at ¶11 and Supp. Lozano Decl., at ¶11 (emphasis added). However, as far as we can tell, plaintiffs' never submitted evidence indicating the amount of that charge. Accordingly, no reimbursement for this request is included.

C. Total Fees and Costs

If the District Judge adopts this Court's recommendation to confirm the Board of Adjustment Award, we RECOMMEND that the District Judge award plaintiffs costs and fees in the amount of $6,780.68 ($5,400.00 for counsel's fees, $665.00 for their paralegals, and costs for $715.68).[10]

IV. Conclusion

We RECOMMEND that Judge Hamilton CONFIRM the March 10, 2004, Board of Adjustment Award.

We also RECOMMEND that Judge Hamilton GRANT plaintiffs' request for default judgment for the following:

(1) an order directing defendants to submit to an audit,

(2) an order requiring defendants to pay all sums revealed as due and owing by the contemplated audit on the condition that defendants are given actual notice of the pendency of any further Court proceedings and an opportunity to challenge the results of the audit, and

(3) attorneys' fees and costs in the amount $6,780.68.

The Court ORDERS plaintiffs to serve a copy of this Report and Recommendation on defendants immediately.

IT IS SO REPORTED AND RECOMMENDED.

Dated: September 16, 2005

/s/ Wayne D. Brazil
WAYNE D. BRAZIL
United States Magistrate Judge

Copies to:
Plaintiffs with direction to serve defendants,
PJH, wdb, stats

[10] Plaintiffs' counsel's final fee summation totaled $7,765.00. Fee Decl., at ¶5. According to our math, however, the total is $6,065.00; this sum is based on $4,700.00 for attorneys' fees as evidenced in paragraph 2 of the Supplemental Lozano Declaration, $700.00 for attorneys' fees as evidenced in the "Fee Declaration" and $665.00 for paralegal fees as evidenced in paragraph 4 of the Supplemental Lozano Declaration.